



POLICE DEPARTMENT

October 21, 2015

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Patricio Ovando
Tax Registry No. 922922
Narcotics Borough Bronx
Disciplinary Case No. 2013-10997

The above-named member of the Department appeared before me on September 2, 2015, charged with the following:

1. Said Sergeant Patricio Ovando, while assigned to Narcotics Borough Bronx, on or about July 2, 2012, while on-duty, in [REDACTED] County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Sergeant failed to ensure his subordinate accurately completed arrest paperwork for two (2) arrestees.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT - PROHIBITED
CONDUCT - GENERAL

The Department was represented by Javier Seymore, Esq., Department Advocate's Office, and Respondent was represented by Andrew Quinn, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty.

SUMMARY OF EVIDENCE

On July 2, 2012, Respondent, while assigned to Narcotics Borough Bronx, was the team leader for a buy and bust operation conducted in the vicinity of the 46 and 50 precincts in the Bronx. Detective Gregory Larsen was assigned as the arresting officer for the operation. Several individuals were placed under arrest in the course of the operation that day. Two of the individuals, Person A and Person B, were arrested in the vicinity [REDACTED] Omniform Arrest Reports were prepared for each of these individuals. The arresting officer on each report was listed as Detective Larsen. The supervisor who approved each report was Respondent.

Person B was charged with Criminal Possession of a Controlled Substance in the 3rd degree; Criminal Sale of a Controlled Substance in the 3rd degree; Criminal Trespass in the 2nd degree; and Loitering for the unlawful use of a controlled substance. The details section of the arrest form reads as follows:

AT TPO A/O OBSERVED THE ABOVE DEFT. I/O A BONAFIDE DESIGNATED CLEAN HALLS LOCATION BUILDING LOBBY W/O PERMISSION OR AUTHORITY TO DO SO. ADDITIONALLY THE DEFT WAS LOITERING FOR THE PURPOSE OF NARCOTICS. FURTHERMORE DEFT. WAS FOUND IN THE REACHABLE GRABABLE AREA OF A LARGE QUANTITY OF NARCOTICS. (OXYCODONE & CRACK/COCAINE) IN PLAIN VIEW. (Dep't. Ex. 6).

Person A was charged with Criminal Possession of a Controlled Substance in the 3rd degree, Criminal Possession of a Controlled Substance in the 5th degree, and Criminal Diversion of a Prescription in the 4th degree. The details section of the arrest form reads as follows:

AT TPO A/O OBSERVED THE ABOVE DEFT. IN POSSESSION OF A LARGE QUANTITY OF AN ALLEGED CONTROLLED SUBSTANCE IN PLAIN PUBLIC VIEW. (Dep't Ex. 4).

A property clerk invoice was also prepared regarding Person A. The information on the form was entered by Detective Larsen, who is identified on the form as the finding officer. Respondent approved and signed the form. The property is described as 24 tablet/pill(s) of oxycodone packaged in Rx bottle. In the remarks section the form reads as follows:

AT TPO THE ABOVE PROPERTY IS BEING VOUCHERED AS ARREST EVIDENCE. THE ABOVE PROPERTY WAS RECOVERED FROM SIDEWALK WHICH ABOVE DEFT PLACED (SIC) TO THE GROUND WITH RIGHT HAND UPON APPROACH. (Dep't Ex. 5).

In September 2012, the Internal Affairs Bureau received a call from the Bronx District Attorney's Office advising them that they noticed inconsistencies among the footage in a video they obtained, the information in certain arrest reports including the Person A and Person B reports (Tr. 19), and in Detective Larsen's testimony in the Grand Jury. Larsen testified in the Grand Jury that Person A dropped the drugs to the ground. (Tr. 42).¹ IAB obtained the video (Dep't Ex. 2) from the Bronx District Attorney's Office and concluded that the video showed the oxycodone being recovered from Person A's backpack. (Tr. 31).

ANALYSIS

The essential issue in this case is whether Respondent knew the drugs were not recovered in plain view as indicated on the arrest paperwork. The Department's position is that the video proves that Respondent knew, at the time he approved the arrest paperwork, that the drugs were recovered from a backpack. Respondent's position is that

¹Note that Larsen was subsequently indicted and is facing a perjury charge for lying in the Grand Jury based on this testimony. (Tr. 43).

he did not know the drugs were recovered from the backpack and he approved the arrest paperwork based on the descriptions of what occurred as told to him by the arresting officer, Detective Larsen.

I find that the Department has failed to prove by a preponderance of the evidence that Respondent knew the drugs were not recovered in plain view.

The video consists of two separate views, one taken from the perspective of [REDACTED]. Respondent can be seen at certain points in time being inside the hallway area and at other points being outside the building. At the point in time when the Department contends Detective Lopez is reaching into the backpack, which is located outside of the building, and removing a bottle of drugs, Respondent is not seen in the outside camera view. The Department's first contention is that Respondent is inside the doorway at this time in a position where he could see the drugs being recovered from the backpack and, thus, would have known they were not recovered in plain view. Being in a position where he "could" see something is very different from proving that he did in fact see drugs being removed from the backpack.

A close look at the video at the approximate time stamp of 14:19 to 14:20, from both the inside and outside views, while again not providing a completely clear view, seems to show Respondent to be inside the hallway with his back facing the area where Lopez is going into the backpack.

The Department further points to a portion of the video where, in their interpretation of what is seen on the video, an item taken out of the backpack is handed into the doorway. The Department's next contention is that the item is a pill bottle and it

is being handed to Respondent. The Department's position is that because Respondent was handed the pill bottle he knew the drugs were not recovered in plain view. First of all, the video is not completely clear on what is being taken out of the backpack at any specific point. Also, there is no direct video footage of Respondent receiving any item.

Respondent however is seen on the video leaving the building with an object in his hand which may well be a pill bottle. The Department's contention that this is proof the Respondent knew the drugs were not recovered in plain sight fails for two separate reasons: 1) The actual object in the video is not clearly shown and Respondent can be seen having some other object in his hand at an earlier point in the video before the backpack was even touched, which may or not be the same object he has in his hand when he is exiting the building; and more importantly, 2) even if Respondent did have the pill bottle in his hand as he exited the building, there is still no proof that he knew where the bottle was recovered from. Merely holding a pill bottle after it has been recovered in no way indicates he knew it was not recovered in plain view.

In addition to the failure of the video views to prove that Respondent knew the pills were recovered from inside the backpack, the Department's own witness, Sergeant Scott Massoni, the Internal Affairs investigator in the case, conceded on cross-examination at trial that it was an assumption on his part that Respondent knew where the pills were recovered. (Tr. 58).

I also reject the Department's argument that Respondent would have seen the drugs if they were indeed in plain view. The Respondent at points throughout the two video views was looking in many different places and was not consistently focused on areas near where Person A could have dropped the drugs to the sidewalk as Detective Larsen

maintained. In fact, Respondent was actually inside the building at times while Person A was standing in front of the building.

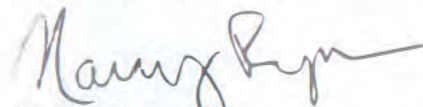
In addition to the Department's failure to prove that Respondent knew the drugs were not recovered in plain view through their video evidence, I find nothing in the Respondent's own testimony to lead me to conclude by a preponderance of the evidence that he knew the drugs were not recovered in plain view. Respondent has worked in narcotics enforcement since 2003. He testified he had worked with Detective Larsen on narcotics cases for over two years and thought of him as a hardworking, committed, and honest individual at the time of the operation in question. (Tr. 84-85). Respondent further testified that he was not present when the pills were recovered from Person A and he was told by Larsen that the pills were recovered in plain view. (Tr. 97-99). Respondent stated that everything in the arrest reports was consistent with what Larsen told him about how the drugs were recovered. I found Respondent's testimony to be straightforward on both direct and cross-examination and find that he was a credible witness. Therefore, I credit his testimony that he did not see the pills recovered and instead relied upon the version of facts given to him by Larsen. Respondent, based on his past interactions with Larsen, would have had no reason to doubt him in this case and was entitled to rely on his version of events as told to Respondent and as then written in the arrest report.

Also, while the Department contends that the video shows Detective Lopez removing the pills from Person A's backpack, Massoni testified that he interviewed Lopez and he denied finding any pills or handing any pills to Respondent. (Tr. 70). During Massoni's interview with Respondent, Respondent said he did not remember where the pills came from. (Tr. 70). Person A told Massoni he never had the pills. (Tr. 71).

The actual charge in this case is that Respondent failed to ensure his subordinate accurately completed paperwork for the two arrestees. It is clear from the IAB investigation that the charge addresses the issue of where the drugs were recovered and if Respondent approved false information being entered on to the arrest reports and property invoice regarding where the drugs were recovered. I find that he did not and therefore is Not Guilty.

It is noted that in the course of the hearing the Department Advocate pointed out that there was a discrepancy in the charges for the arrested individuals in that they were both in a Clean Halls lobby where they were not residents and yet only Person B was charged with misdemeanors concerning this. While Respondent perhaps should have caught this mistake in failing to charge the misdemeanors, he explained that in his practice, he just has an officer do an arrest supplement for a missed misdemeanor rather than voiding the entire arrest. He makes sure that the officer makes the Assistant District Attorney ("ADA") aware of the issue. (Tr. 99-101). I do not find this failure to add misdemeanors to one arrest form rises to the level of actionable misconduct in this case since Respondent's procedure was to have any additional misdemeanor charges discussed directly with the ADA to ensure the misdemeanor charges were correct.

Respectfully submitted,



Nancy R. Ryan

Assistant Deputy Commissioner - Trials

APPROVED

JAN 20 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER